

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

Angela Berger,

Complainant,

vs.

**PROBABLE CAUSE
ORDER**

Richard Novack.

Respondents.

TO: Angela Berger 4809 60th St. W, Edina, MN 55424; and Richard Novack, 5805 Interlachen Blvd., Edina, MN 55436

On October 18, 2012, the Complainant, Angela Berger, filed a complaint under the Fair Campaign Practices Act. The above-entitled matter came on for a probable cause hearing as provided by Minn. Stat. § 211B.34, before Administrative Law Judge James E. LaFave on October 24, 2012. The probable cause hearing was conducted by telephone conference call.

Angela Berger, the Complainant, appeared on her own behalf and without counsel. Richard Novack, the Respondent, appeared on his own behalf and without counsel.

Based upon the record and all the proceedings in this matter, and for the reasons set forth in the attached Memorandum incorporated herein, the Administrative Law Judge makes the following:

ORDER

IT IS HEREBY ORDERED THAT:

1. There is probable cause to believe that Respondent Richard Novack violated Minn. Stat. § 211B.06 by knowingly preparing and disseminating false campaign material concerning the personal character, political character or acts of candidate Bill Glahn.

2. This matter is referred to the Chief Administrative Law Judge for assignment to a panel of three Administrative Law Judges, pursuant to Minnesota Statute § 211B.35 and to determine whether this case should be consolidated with

Berger v. Cashmore, OAH Docket No. 0320-30021, as both cases arise out of the same set of operative facts.

3. Should the Parties decide that the attached Memorandum adequately summarizes the arguments made at the probable cause hearing, and that this matter may be submitted to the assigned Panel based on this Order and the exhibits received into the record, without an evidentiary hearing, they should notify the undersigned Administrative Law Judge by **4:30 p.m. on Tuesday, November 8, 2012**. If both Parties do not agree to waive their right to an evidentiary hearing, this matter will be scheduled for an evidentiary hearing in the near future.

Dated: November 1, 2012

s/James E. LaFave

JAMES E. LAFAVE
Administrative Law Judge

MEMORANDUM

Introduction

This case concerns campaign material that was sent to voters in District 49A. The mailing was a 8½" X 5 ½" postcard distributed by Intelligent Choices Minnesota, a 501(c)(4) non-profit association formed by John Cashmore.¹ The Respondent, Richard Novack, at the direction of Mr. Cashmore, drafted and prepared the mailing. Mr. Cashmore approved the mailing.

The Complaint alleges that the mailing contained two false statements.

(1) Candidate Bill Glahn actually said that he will lie to the public in one of his online blogs, which he has now hidden; and

(2), Bill says 'Elite' people like himself should lie to the public to achieve goals.

The mailing claimed it had "fully documented information" and referenced Mr. Glahn's blog "Hypocrisy is Good" as factual support for the statements in the mailing.²

¹ On October 2, 2012, Angela Berger filed a Campaign Complaint with the Office of Administrative Hearings alleging that John Cashmore violated Minnesota Statutes § 211B.06 in connection with the campaign for the seat in the Minnesota House of Representatives from District 49A. OAH Docket No. 3020-30021. She alleges Mr. Cashmore disseminated the mailing that is at issue in this case.

² Attachments to the Complaint, taken from the Intelligent Choices Minnesota (ICM) web site, state that Mr. Glahn's blog disappeared from the internet after he received his party's endorsement but that a member of ICM copied them before they disappeared.

The Complainant, Ms. Berger, maintains the alleged false statements do not appear in Mr. Glahn's blog, that they distort the meaning of the blog, and that they were disseminated with the intent to slander Mr. Glahn.

Legal Standard

Minn. Stat. § 211B.06, Subd. 1 states:

A person is guilty of a gross misdemeanor who intentionally participates in the preparation, dissemination, or broadcast of paid political advertising or campaign material with respect to the personal or political character or acts of a candidate, or with respect to the effect of a ballot question, that is designed or tends to elect, injure, promote or defeat a candidate for nomination or election to a public office or to promote or defeat a ballot question, that is false, and the person knows is false or communicate to others with reckless disregard of whether it is false.

The purpose of a probable cause determination is to determine whether, the facts available establish a reasonable belief that the Respondent has committed a violation.³ If the judge is satisfied that the facts appearing in the record, including reliable hearsay, would preclude the granting of a motion for a directed verdict, a motion to dismiss for lack of probable cause should be denied.⁴

A judge's function at a probable cause hearing does not extend to an assessment of the relative credibility of conflicting testimony. At a hearing on the merits, a panel has the benefit of a more fully developed record and the ability to make credibility determinations in evaluating whether a violation has been proved, considering the record as a whole and the applicable evidentiary burdens and standards.

Respondent's Arguments

There is no dispute the alleged statements appear on the mailing. Respondent Novack, however, makes five arguments as to why there is no violation of Minn. Stat. § 211B.06. Each argument is addressed below in turn.

First, Mr. Novack argues there is no violation of the law because he falls under the exception contained in Minn. Stat. § 211B.06 subd. 2.

Minn. Stat. § 211B.06, Subd. 2. **Exception.** states:

³ *State v. Florence*, 239 N.W.2d 892, 902 (Minn. 1976).

⁴ *Id.* at 903. In civil cases, a motion for a directed verdict presents a question of law regarding the sufficiency of the evidence to raise a fact question. The judge must view all the evidence presented in the light most favorable to the adverse party and resolve all issues of credibility in the adverse party's favor. See, e.g., Minn. R. Civ. P. 50.01; *LeBeau v. Buchanan*, 236 N.W.2d 789, 791 (Minn. 1975); *Midland National Bank v. Perranoski*, 299 N.W.2d 404, 409 (Minn. 1980). The standard for a directed verdict in civil cases is not significantly different from the standard for summary judgment. *Howie v. Thomas*, 514 N.W.2d 822 (Minn. App. 1994).

Subdivision 1 does not apply to any person or organization whose sole act is, in the normal course of their business, the printing, manufacturing, or dissemination of the false information. The exception would cover, for example, a printing house whose regular business includes the manufacture of advertising brochures.

The exception does not apply in this case. The exception only applies if the person's **sole** act was the printing, manufacturing or dissemination of the false material. Mr. Novack's participation went much farther. Mr. Novack drafted the language in question. The fact that he did so at the direction of Mr. Cashmore does not change the analysis. Mr. Novack's participation went beyond the parameters of the exception contained in Minn. Stat. § 211B.06, subd. 2.

Second, the Respondent argues the statements are essentially true. He maintains that the statements are reasonable inferences taken from Mr. Glahn's own writings and therefore do not violate the terms of Minn. Stat. § 211B.06.

*Mr. Novack relies on Mr. Glahn's blog "Hypocrisy is Good: Wanted, More Hypocrisy in Politics" to support his claim. The last paragraph of that blog paragraph states "[T]o reverse these disturbing trends, if it takes a little hypocrisy among our elites, then sign me up."*⁵ He argues that Intelligent Choices Minnesota reasonably inferred from the blog entry that Glahn will lie to the public to achieve his goals.

The declaration in the mailing "Candidate Bill Glahn actually said that he will lie to the public in one of his online blogs ...", is a verifiable statement of fact. The Complainant, Ms. Berger, argues that the inflammatory statement attributed to Mr. Glahn does not appear in the blog. She is correct. Nowhere in the blog "Hypocrisy is Good" does Mr. Glahn actually state he will lie to the public.

In *Kennedy v. Voss*,⁶ the Minnesota Supreme Court observed that the statute is directed against the evil of making false statements of fact and not against unfavorable deductions, or inferences based on fact – even if the inferences are "extreme and illogical."⁷ The Court pointed out that the public is protected from such extreme and illogical inferences by the ability of other speakers to rebut these claims during the campaign process.⁸

A challenged statement's specificity and verifiability, as well as its literary and public context, are also factors to be considered when distinguishing between fact and opinion.⁹ In some cases, a reviewing tribunal will look beyond the literal phrase that was published to what a reasonable reader would have understood the author to have said. Expressions of opinion, rhetoric, and figurative language are generally protected

⁵ See Blog "Hypocrisy is Good" attached to Complaint.

⁶ See *Kennedy v. Voss*, 304 N.W.2d 299, (Minn. 1981).

⁷ *Id.* at 300.

⁸ *Id.*

⁹ *Diesen v. Hessburg*, 455 N.W.2d 446, 451 (Minn. 1990).

speech if, in context, the reader would understand that the statement is not a representation of fact.¹⁰

In this case, Ms. Berger established probable cause to believe that (1) a reasonable reader would not understand Respondent's statement as to what Mr. Glahn "actually said", was opinion, rhetoric or figurative language; (2) Respondent's statement was false; and (3) a violation of Minn. Stat. 211B.06 has occurred.

Third, Mr. Novack argues that the postcard from Intelligent Choices Minnesota has been mischaracterized as an "independent expenditure" on behalf of Ron Erhardt. Yet, the proper accounting of the expenses relating to this mailing is not the subject of the Complaint or, in the case of a contest for a seat in the Minnesota Legislature, under the jurisdiction of this Office.¹¹ Accordingly, regardless of whether the mailing expenses are an independent expenditure, an in-kind expense, or something else, that classification does not determine whether the postcard qualifies as "campaign material" under section 211B.01 or includes false statements of fact.

Fourth, Respondent argues that Ms. Berger has filed charges with the Office of Administrative Hearings, the Campaign Finance Board, and the press that were not made in good faith. He further argues the charges were made to generate negative publicity that could not be countered before Election Day.

The Complaint has a reasonable basis in law and fact. Ms. Berger's personal motivations for bringing the Complaint are not a factor in deciding whether there is probable cause.

Finally, Respondent argues Mr. Glahn has, in fact, lied to the public.

Mr. Novack claims that, on September 21, 2012, Mr. Glahn lied in an interview with Mary Lahammer of Twin Cities Public Television by denying he had any affiliation with the Tea Party. Mr. Novack asserts that Mr. Glahn had been connected to the Tea Party since at least 2011 and that Mr. Novack has personal knowledge Mr. Glahn has claimed membership in the Tea Party. He argues that since Mr. Glahn has lied to the public, the allegations contained in the mailing are therefore true.

Assuming it were true that Mr. Glahn did lie in an interview with Twin Cities Public Television as alleged by Mr. Novack, that is irrelevant to this case. The issue is not whether Mr. Glahn told a lie during that interview; the issue is whether Mr. Glahn "actually" said he will lie to the public in an online blog.

¹⁰ *Jadwin v. Minneapolis Star Tribune*, 390 N.W.2d 437, 441 (Minn. App. 1986), citing *Old Dominion Branch No. 496, National Assoc. of Letter Carriers v. Austin*, 418 U.S. 264, 284-86 (1974); *Greenbelt Coop. Publishing Assoc. v. Bressler*, 398 U.S. 6, 13-14 (1970). See also, *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 16-17 (1990); *Hunter v. Hartman*, 545 N.W.2d 699, 706 (Minn. App. 1996).

¹¹ See, Minn. Stat. §§ 211A.02 and 211B.32, subd. 1.

The Administrative Law Judge concludes that based on the record presented, the Complainant has demonstrated probable cause to believe that the Respondent violated Minn. Stat. § 211B.06. It is therefore reasonable to require the Respondent to go to hearing on the merits and to allow a panel of three Administrative Law Judges to determine whether the Respondents violated Minn. Stat. § 211B.06, and in the event a violation is found what penalty may be appropriate.

J. E. L.